Petition

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No. 81-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

VIRGINIA M. ST. PETER,

Petitioner,

v.

SECRETARY OF THE ARMY.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Question Presented

Did petitioner prove that she had been discriminated against because of her sex in violation of Title VII of the Civil Rights Act of 1964, as amended, when it was established that:

(1) She was more qualified than the male selected;

(2) The procedures by which the selection was made violated civil service rules designed to ensure that decisions are based on merit and qualifications;

(3) There was direct evidence of sexual bias on the part of the selecting officials?

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No. 81-

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

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VIRGINIA M. ST. PETER,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Petitioner, Virginia M. St. Peter, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit, entered on July 1, 1981, rehearing denied August 13, 1981. The opinion of the Court of Appeals is as yet unreported

and is set out in the Appendix hereto at pages 1a to 27a. The opinion of the United States Magistrate of July 9, 1979, and judgment entered thereon are unreported and are set out in the Appendix at pages 28a-43a. The order of the District Court approving the opinion of the Magistrate is set out in the Appendix hereto at pages 44a-45a. The orders of the Court of Appeals denying rehearing and rehearing en banc are set out in the Appendix hereto at pages 46a-50a.

Jurisdiction

The judgment of the Court of Appeals was entered on July 1, 1981. A timely petition for rehearing was filed on July 15, 1981, and the order of the Court of Appeals denying the petition for rehearing and the suggestion for rehearing en banc was entered on August 13, 1981. Jurisdic-

tion of this Court is invoked under 28 U.S.C. § 1254(1).

Statutory Provisions Involved

Sections 717(a),(c), and (d) of the Equal Employment Opportunity Act of 1972, amending Title VII of the 1964 Civil Rights Act (42 U.S.C. §2000e-16 (a)(c) and (d)) provide in pertinent part:

> (a) All personnel actions affecting employees or applicants for employment (except with regard to aliens employed outside the limits of the United States) in military departments as defined in section 102 of Title 5, in executive agencies as defined in section 105 of Title 5 (including employees and applicants for employment who are paid from nonappropriated funds), in the United States Postal Service and the Postal Rate Commission, in those units of the Government of the District of Columbia having positions in the competitive service, and in those units of the legislative and judicial branches of the Federal Government having positions in the competitive service, and in the Library of Congress shall be made free from any

discrimination based on race, color, religion, sex, or national origin.

* * * *

(c) Within thirty days of receipt of notice of final action taken by a department, agency, or unit referred to in subsection (a) of this section, or by the Civil Service Commission* upon an appeal from a decision or order of such department, agency, or unit on a complaint of discrimination based on race, color, religion, sex or national origin, brought pursuant to subsection (a) of this section, Executive Order 11478 or any succeeding Executive orders, or after one hundred and eighty days from the filing of the initial charge with the department, agency, or unit or with the Civil Service Commission* on appeal from a decision or order of such department, agency or unit until such time as final action may be taken by a department, agency, or unit, an employee or applicant for employment, if aggrieved by the final disposition of his complaint, or by the failure to take final action on his complaint, may file a civil

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*/ References to the Civil Service Commission are now to the Equal Employment Opportunity Commission pursuant to 1978 Reorganization Plan No. 1, 43 F.R.D. 19807, 925 Stat. 3781.

action as provided in section 2000e-5 of this title, in which civil action the head of the department, agency, or unit, as appropriate, shall be the defendant.

(d) The provisions of section 2000e-5(f) through (k) of this title, as applicable, shall govern civil actions brought hereunder.

Pub. L. 88-352, Title VII, § 717, as added Pub. L. 92-261, § 11, Mar. 24, 1972, 86 Stat. 111; as amended Pub. L. 96-191, § 8(g), Feb. 15, 1980, 94 Stat. 34.

Statement of the Case

This is an action brought under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e-16. Petitioner, Virginia M. St. Peter, the plaintiff below, is a civilian employee of the United States Army. This action was commenced in 1978 after a final decision of the Department of the Army denying petitioner's claim that she had been discriminated against because

of her sex when a male was promoted to a GS-12 position in the United States Military Personnel Center (MILPERCEN).

By agreement between the parties the case was tried before a magistrate on May 7, 8, 9, 1979. Following the trial the magistrate entered findings of fact and conclusions of law. She found, inter alia, that the petitioner and two other candidates for the position in question were better qualified than the ultimate selectee. (App., p. 32a) Nevertheless, petitioner's claim that the action violated her rights under Title VII was denied on the ground that since the action also disadvantaged male applicants, there was no discriminatory intent. (Id., p. 37a.) The district court upheld the magistrate's findings as not clearly erroneous (App., pp. 44a-45a.)

Petitioner appealed to the Court of Appeals for the District of Columbia, which affirmed the decision below by a two to one vote, but without a single opinion for the Court. Judge Tamm wrote an opinion discussing the standards established by Texas Department of Community Affairs v. Burdine, ___ U.S. ___, 67 L.Ed. 2d 207 (1981), and held that Burdine's requirement that the defendant come forth with a legitimate, non-discriminatory reason for the personnel action had been satisfied (App., pp. 1a-22a.) Judge Mikva concurred in the result but pointed out that Burdine was not fully dispositive, since the district court here had held that the plaintiff was more qualified then the person hired (App., pp. 23a-25a.) Judge Nichols of the Court of Claims dissented, largely on the ground that since

the reason offered to rebut petitioner's prima facie case demonstrated that proper personnel procedures had not been followed and that, indeed, the methods were frivolous, the defendant had not demonstrated a legitimate reason for the action (App., pp. 26a-27a.)

A timely petition for rehearing and suggestion for rehearing en banc were filed. They were denied with Circuit Judge Wright being in favor of granting a rehearing en banc (App. pp., 47a-50a.)

Statement of the Facts

During the time material to this case, plaintiff was employed by the Department of the Army at the United States Military Personnel Center (MILPERCEN) in Alexandria, Virginia, at the GS-11 level. One of the positions at the Center is Chief of the United States Military Academy Section,

Officer Accessions Branch. The incumbent of the position is responsible for directing the nomination process for the United States Military Academy at West Point. The Chief deals with nominating officials, including members of Congress, their staffs and other high level government and military officials, and determines the eligibility of applicants for certain nominations.

In 1975 the position became vacant and the selection supervisor, Colonel Willliam Hornish, contacted the personnel office and requested that the selection process be initiated. (J. A. p. 84)[1/] Colonel Hornich wished the requirements for the position to include that the selectee be a West Point graduate and under 40 years of

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1/ Citations are to the Joint Appendix filed in the Court of Appeals.

age (App., 39a.) He was informed, however, that such qualifications would discriminate on the grounds of both sex and age and therefore were not permissible. Although these requirements were not specifically stated in the statement of qualifications, the person selected for the position in 1975 was in fact a male West Point graduate.

The position became vacant again in 1976, and under the procedures in effect petitioner, along with other eligible GS-11 employees, was considered. Eligible persons were rated and ranked and interviewed by a two-member committee. A male, Thomas Staples, was selected for the position over petitioner and petitioner filed a charge of discrimination based on sex. During the investigation of the discrimination charge the selecting offi-

cial, Lt. Col. Vespia, told the Equal Employment Opportunity counselor that he had been looking for someone who would fit his image of a West Point cadet, and who could inter-act "buddy-to-buddy" with Congressmen (Trans.*, p. 137). The EEO officer therefore concluded that Col. Vespia preferred a man for the position and recommended that the selection be made again (Trans., p. 142). The selection process was there after voided, also because of several other procedural irregularities (App., p. 31a).

In the second selection process, eligible employees were again rated and ranked by a panel, which selected out the best qualified candidates. This group of nine persons included petitioner and Mr. Staples, the person originally selected.

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*/ References are to the Transcript of the trial before the magistrate.

An interview committee consisting of three men, including Colonel Hornish, the selection supervisor, was set up. The interviewing panel did not review any of the documentation relating to the qualifications of the candidates, and, indeed, were "totally ignorant" of their backgrounds (App., p. 35a). Rather, the selection was made solely on the basis of their performance in interviews lasting from between two to 15 minutes. Moreover, the candidates were not informed that they would be judged on the basis of their interview alone (App. 35a-36a). As discussed below, this procedure violated Civil Service Commission directives governing selection between candidates for a competitive position in the federal service.

Judge Tamm's opinion for the court below states that defendant "chose not to review the applicants' backgrounds prior to

the interviews because of a belief in the general equality of qualifications," and that this reliance on interviews alone provided the "nondiscriminatory rationale" for the selection (App., p. 18a). However, this was not the defendant's choice to make; Chapter 335 of the Federal Personnel Manual provided, at the time the selection here was made, that:

> The selecting official should be provided with enough information about the qualifications of the candidates referred to him (for example, the candidates' experience, training, and education) to enable him to make a sound choice. He must be informed of any awards received by the candidates and must be given any supervisory appraisals on the candidates.

Federal Personnel Manual, Chapter 335, Subchapter 3-7b(2).

The three-member panel voted unanimously to again select Mr. Staples based solely on the image he projected during his inteview. Colonel Hornish testified that he was looking for somebody who looked

neat in appearance and who would represent not only the Army but "the Military Academy" (J.A., p. 93). Colonel Hornish testified that he was favorably impressed by Mr. Staples because he was "direct, neat, crew cut, very enthusiastic about the job" (J.A., p. 95).

After hearing all of the evidence the magistrate found as a matter of fact that Mr. Staples was substantially less qualified than petitioner, and indeed was the least qualified of the four candidates who testified at the trial (App., pp. 32a-35a). Although Mr. Staples had performed well in the positions he had held, plaintiff had impressive and far superior qualifications in light of her distinguished Army career, her development of extension courses, her frequent contact with Congressional and high ranking military officials and her experience in other jobs of evaluating, se-

lecting and placing reserve officers and ROTC candidates in the regular Army (App., pp. 32a-33a).

The magistrate also described in detail the ways the selection process had failed to comply with regulations and procedures established both by the Civil Service Commission and the Department of the Army. The court held that:

> In sum, from all the testimony adduced at the trial, the selection process appears to have been totally subjective, based on fleeting impressions gained during the brief interviews (estimates ranged from 2 to 15 minutes), and without any consideration to the qualifications of the candidates who were being considered, other than the impressions made (or not made) during the interviews.
>
> From all the evidence adduced by both sides, this Court can only conclude that the selection process for this important and sensitive position resembled nothing so much as the game of "eenie, meenie, minie, moe," with the results being of about that quality.

(Appendix, pp. 36a-37a).

Despite these findings, the magistrate, relying on this Court's decision in Personnel Administrator of Massachusetts v. Feeney, 442 U.S. 256 (1979), held that since a number of men had also not been selected as a result of the procedures used there was no discrimination (App., p. 40a). The conclusions of the magistrate were challenged by the petitioner, but were upheld as not being clearly erroneous by the district court judge. On appeal the petitioner did not challenge the facts found by the lower court, but urged that as a matter of law they required a conclusion that there had been discrimination in violation of Title VII. The government also did not challenge the facts as clearly erroneous but did argue that petitioner's qualifications were not superior to those of the selectee. On

appeal, although Judges Tamm and Mikva expressed some reservations concerning the facts found by the district court, they did not find them to be clearly erroneous and therefore based their decisions on the undisputed facts as set out above.

Reasons for Granting The Writ

I.

THIS CASE PRESENTS ISSUES OF IMPORTANCE IN THE ENFORCEMENT OF TITLE VII, SPECIFICALLY WITH REGARD TO THE STANDARDS APPLICABLE TO CASES INVOLVING FEDERAL EMPLOYEES.

As will be discussed below, the Court of Appeals' decision conflicts with this Court's decision in Texas Department of Community Affairs v. Burdine, ___ U.S. ___. 67 L.Ed. 2d 207 (1981), with regard to both the type of evidence sufficient to meet a prima facie case of discrimination, and the question of what constitutes a legiti-

mate, non-discriminatory reason for a personnel action. In the latter regard this case presents the Court with the opportunity to clarify the Burdine standard, particularly as it relates to federal government agencies.

Petitioner urges that a reason articulated in response to a prima facie case of discrimination cannot be "legitimate" or "lawful" under Burdine if it demonstrates a violation of federal law and regulations governing personnel actions, since such an explantion necessarily cannot "be legally sufficient to justify a judgment for the defendant". 67 L.Ed.2d at 216. The dissent below agreed, pointing out that a frivolous procedure could not constitute a legitimate reason for an action. The issue was not addressed by the concurring judge, but Judge Tamm, who announced the decision

of the Court, brushed the proposition aside with the assertion that courts "are not in the personnel business." (App., p. 19a, n.5) This case, therefore presents an important issue unresolved by Burdine and its predecessors, viz., what constitutes a "legitimate" reason.

In the context of federal employment, a fair reading of McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1972), Furnco Construction Corp. v. Waters, 438 U.S. 567 (1978), and Burdine leads to the conclusion that an action in violation of the law cannot be the basis of overcoming a prima facie case.[2/] The issue is of great im-

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2/ Thus, unlike private employers (see, Furnco Construction Corp. v. Waters, 438 U.S. at 578) federal agencies are not free to run their employment practices in any way they see fit, but are bound by statute (Title 5, United States Code), regulations (Title 5, Code of Federal Regulations), and mandatory directives embodied in the Federal Personnel Manual.

portance since it will affect the adjudication of the claims of all federal employees arising under Title VII and other statutes prohibiting discrimination in employment. The number of such cases at the administrative level and in the courts is growing, particularly in the District of Columbia.[3/]

Both the Equal Employment Opportunity Commission and the United States Merit System Protections Board apply the principles set out in Burdine in the administrative determination of discrimination complaints

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3/ See, e.g., Aikens v. U.S. Postal Service, 642 F.2d 514 (D.C. Cir. 1980), vacated and remanded, ___ U.S. ___, 69 L.Ed.2d 989 (1981), decision on remand, ___ F.2d ___, 26 F.E.P. Cases 1151 (Sept. 8, 1981); Daye v. Harris, 655 F.2d 258 (D.C. Cir. 1981); Davis v. Califano, 613 F.2d 957 (D.C. Cir. 1979); Marotta v. Usery, 629 F.2d 615 (9th Cir. 1980); Page v. Bolger, 645 F.2d 227 (4th Cir. 1981); Rakestraw v. U.S. Penitentiary, ___F.Supp. ___ 24 F.E.P. Cases 1316 (N.D. Ga. 1980); Lee v. Bolger, 454 F. Supp. 226 (S.D.N.Y. 1978).

before them. In many of these cases, the claim is made that the personnel action challenged has not been accomplished in accord with procedures designed to ensure that decisions are made on the basis of merit and qualifications. For the guidance of both the courts and the administrative bodies charged with the enforcement of Title VII, it is essential that this Court make it clear that departures from proper procedures not only cannot form a defense to a Title VII claim, but, as the dissenting Judge noted, constitute independent evidence of an intent to discriminate. Arlington Heights v. Metropolitan Housing Corp., 429 U.S. 252, 267 (1977).

II.

THE DECISION OF THE COURT BELOW CONFLICTS WITH DECISIONS OF THIS COURT.

In McDonnell Douglas Corp. v. Green, supra, this Court held that one purpose of

Title VII was to advance the societal interest in "efficient and trustworthy workmanship assured through fair and racially neutral employment and personnel decisions", 411 U.S. at 801. Thus, Title VII did not guarantee a job to every person "'regardless of qualifications'" (Id., at 800). Consistent with McDonnell Douglas this Court held last term in Texas Department of Community Affairs v. Burdine, supra, that an employer had "discretion to chose between equally qualified candidates" so long as the selection was not affected by discrimination based on sex (67 L.Ed.2d at 219) (emphasis added).

Burdine reaffirms that the employer must produce evidence of a "legitimate, nondiscriminatory"[4/] or "lawful"[5/] reason

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4/ 67 L.Ed.2d at 216.

5/ The Court in Burdine states at two points in the decision that the "employee's

for denying the individual the position. This burden was not met in the instant case. In Burdine the court identified some of the factors that must be considered in order to determine the sufficiency of the employer's evidence offered to meet this burden. The employer's articulation must be legally sufficient to justify a judgment in the employer's favor.[6/] Further, the employer's explanation of its legitimate nondiscriminatory reason must be clear and

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5/ continued

prima facie case of discrimination will be rebutted if the employer articulates lawful reasons for the action..." 67 L.Ed.2d at 218. Later the Court opined that "... the employer has the discretion to choose among equally qualified candidates, provided the decision is not based on unlawful criteria". Id. at 219.

6/ See generally, Lubbock Feed Lots, Inc., v. Iowa Beef Processors Inc., 630 F.2d 250 (5th Cir. 1980); Boeing Co. v. Shipman, 411 F.2d 365 (5th Cir. 1969).

reasonably specific.[7/]

In the present case, the courts below upheld the extraordinary result of selecting a male less qualified than a woman, and refused to find that such an action was based on intentional discrimination. The difficulty with the decisions of the courts below is that it is impossible to discern what evidence would have satisfied them that discrimination based on sex played an important, if not determinative, role in the employment decision in question. Indeed, one is left with the distinct impression that what was looked for was evidence close to an admission of sexual bias. This court, however, has made it clear that such evidence is not required, since selecting officials are not going to admit discrimination in open court even

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7/ 67 L.Ed.2d at 218.

if they have admitted it to themselves. See, e.g., Teamsters v. United States, 431 U.S. 324, 358 n. 44 (1977).

The decisions of the courts below are particularly difficult to understand since there was an unusual amount of evidence here pointing to overt discrimination. The ultimate selecting official had originally wished that the position be filled by a West Point graduate, and at that time only males could so qualify. The official who selected the male applicant in the first instance stated to an EEO investigator that he was looking for someone who could interact "buddy-to-buddy" with congressmen. The selecting official in the second go-round testified that he was impressed by the selectee's "crew cut" appearance at his interview.

The standards used for the actual selection, based as they were entirely on a personal appearance at a short interview with no prior warning to the applicants that that was to be the sole basis for the choice, were subjective in the extreme. As this court has noted in another context, subjectivity at the point of selection can easily mask discrimination and calls for particular scrutiny by the courts. Turner v. Fouche, 396 U.S. 346, 360 (1970); see also, Davis v. Califano, 613 F.2d 957, 965-66 (D.C. Cir. 1980).

The court below held that there was a legitimate nondiscriminatory reason for the selection but one must search the record in vain to find out what it was, since the selection itself was carried out in violation of legally mandated procedures. In the face of all of this, the court below

held that petitioner did not meet her burden of proof, and that the record showed that the selection of a less qualified man was not the result of discrimination. What then, it must be asked, was it the result of? And what more must a plaintiff show than was proven in this case?

Petitioner urges that certiorari should be granted to make it clear that Burdine was not written to sound the deathknell of individual Title VII cases, and that nothing in it stands for the proposition that the selection of a less qualified male can be explained away by reliance on personnel actions that were illegal and frivolous.[8/] In short, Burdine held that

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8/ The district court's basis for its decision, a reliance on Personnel Administration of Massachusetts v. Feeney, 442 U.S. 256 (1979), for the proposition that because some men were also not selected there could not be discrimination based on

an employer was free to select between equally qualified candidates, but not to select a less qualified male through the use of procedures that necessarily can not be "legally sufficient to justify a judgment for the" employer. 67 L.Ed.2d at 216. If certiorari is not granted and the

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8/ continued

sex, was also directly in conflict with decisions of this court. Such an approach ignores the fact that the system operated in favor of a man and thus overlooks this Court's holding in Griggs v. Duke Power Co., 401 U.S. 424 (1971) reaffirmed by McDonnell Douglas Corp. v. Green, supra at 800, that "discriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed." 401 U.S at 430-31. Of course, since there was only one position open only one of the men could be selected for it, but that does not in any way change the fact that there was discrimination based on sex in favor of men as a group. To hold otherwise would give employers an absolute defense to almost every Title VII claim, since in the great majority of cases more than one white male will be in competition for a promotion or a initial hire.

decision below reversed, one consequence will be that employers generally, and federal agencies in particular, will be left with the impression that they can do anything they wish so long as no one actually confesses that they intended to discriminate. Such a result would render Title VII a dead letter.

III.

THE DECISION BELOW CONFLICTS WITH DECISIONS OF OTHER COURTS OF APPEAL

The need for this Court's review is most compelling in light of the incongruency between the opinions from other circuit courts and the Court of Appeals for the District of Columbia.

As set forth in the statement of the case, the court below accepted the employer's articulated reason for its selection decision in the absence of any clear

showing that the reason was a legitimate and lawful one. The Fifth Circuit's ruling in Robbins v. White-Wilson Medical Center, Inc., 642 F.2d 153 (5th Cir. 1981) is in direct conflict with the decision in the present case. In Robbins v. White-Wilson the court, in construing Burdine to require the employer's articulation to be a legitimate, clear, and specific reason sufficient to rebut the inference of discrimination, rejected the employer's reason that it relied solely upon a subjective interview process. Robbins v. White-Wilson Medical Center, Inc. at 156 citing Johnson v. Uncle Ben's, Inc., 628 F.2d 419, 426 (5th Cir. 1980); Parson v. Kaiser Aluminum & Chemical Corp., 575 F.2d 1374, 1385 (5th Cir. 1978), cert. denied, 441 U.S. 968 (1979); James v. Stockham Valves & Fittings Co., 559 F.2d 310, 345 (5th Cir.

1977), cert. denied, 434 U.S. 1034 (1978); Rowe v. General Motors Corp., 457 F.2d 348, 359 (5th Cir. 1972). The Court concluded that the interview process which was the sole determining factor in a hiring selection process was intrinsically subjective and therefore could not meet the burden of being a "legally sufficient" explanation in the "clear and reasonably specific" manner as imposed by the court in Burdine. Robbins v. White-Wilson Medical Center, Inc., at 157.

The facts now before the Court are dramatically similar to those in Robbins v. White-Wilson Medical Center, Inc., but the resulting opinions are in direct opposition. Here, the district court determined that the selection process (which was not conducted in compliance with governing

regulations) was also subjective and arbitrary, resembling the game of "eenie, meenie, minie, moe." The court of appeals in addressing the issue, rather obliquely discounted the significance of the determination by asserting that the court is not in the personnel business.[9/] It did hold, however, that reliance solely on a brief subjective interview constituted a legitimate and lawful reason for the action, a result squarely in conflict with the Fifth Circuit.

9/ The notion that the courts should take a "hands off" approach in circumstances which involve difficult or complex facts and determinations has been nullified in employment cases involving academia. Sweeney v. Board of Trustees of Keene State College, 569 F.2d 169, 176 (1st Cir. 1978), vacated and remanded on other grounds, 439 U.S. 24 (1978).

The sufficiency of a defendant's articulated nondiscriminatory reasons was at issue at a recent ruling from the Tenth Circuit in Mistretta v. Sandia Corp., 649 F.2d 1383 (10th Cir. 1981). The Court analyzed the performance evaluation system and concluded that it was subjective, over-generalized and infected with mechanicisms which promote bias. In reversing the district court's determination of non-discrimination as in error, the Court applied Burdine to hold that "subjective factors are permissible if they are non-discriminatory ..." Mistretta v. Sandia Corp., supra at 1389. See also, Saunders v. Hercules, Inc., 510 F.Supp. 1137, 1141 (W.D. Va. 1981). (Defendant's mere statement that it discharged a male guard and not female guards because females were necessary, was a non-sequitur, insuf-

ficient to dispel the plaintiffs' case in accordance with the standards ennunciated in Burdine.)

Finally, the holding below, approving the selection of a less qualified male on the basis of standardless and subjective criteria conflicts with a pre-Burdine decision of the Ninth Circuit, which held that, in the absence of a satisfactory explanation, it must be assumed that a more qualified applicant would be selected in the absence of discrimination. Marotta v. Usery, 629 F.2d 615 (9th Cir. 1980).

In sum, the decision of the court below is in square conflict with a decision of the Fifth Circuit and is inconsistent with decisions of the Ninth and Tenth Circuits. Certiorari should be granted to resolve these conflicts and to give further guidance to the lower courts in deciding these important cases.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted and the decision of the court below reversed.

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Appendix

DECISION OF THE COURT OF APPEALS,
July 1, 1981

IN THE

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

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No. 79-2066

VIRGINIA M. ST. PETER,

Appellant,

v.

SECRETARY OF THE ARMY.

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Appeal From the United States District Court
For The District of Columbia
(D.C.Civil No. 78-0187)

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Argued December 11, 1980

Decided July 1, 1981 [Judgment entered this date]

Opinion filed by Circuit Judge Tamm.

Separate opinion concurring in the

result filed by Circuit Judge Mikva.

Dissenting opinion filed by Judge Nichols.

TAMM, Circuit Judge: In this case plaintiff Virginia M. St. Peter alleges the violation of Title VII of the Civil Rights Act of 1964 by Army officials in their promotion of a male, rather than the plaintiff, to a civilian GS-12 position in the United States Military Personnel Center (MILPERCEN) in Alexandria, Virginia. The case was tried before a United States Magistrate who recommended jugment for the defendants; this recommendation was adopted by the district court. Plaintiff attacks this decision on several grounds. Because we find no prejudicial error in the proceedings, we affirm the judgment for the defendants.

I. BACKGROUND

A. The Selection Process

In August of 1976, the position of Chief of the United States Military Academy Section (Chief, or Chief of USMAS), Officer Accessions Branch, of the Officer Personnel Management Directorate (OPMD), was vacant. The Chief of USMAS is responsible for directing the nomination process for the United States Military Academy at West Point. The Chief makes annual requests for submission of nominations by nominating authorities and determines the eligibility of applicants for certain nominations. The Chief of USMAS also deals with nominating officials, including members of Congress, their staffs, and other high-level government and military officials.

A formal selection procedure was used to fill this position. Initially, a rating

and ranking panel selected five candidates it considered "best qualified," including the plaintiff and Thomas K. Staples, the eventual selection; these candidates were then interviewed by a two-member committee. The final selection decision was made by Lt. Col. Vespia, a member of the interviewing committee and assistant to Col. Hornish, the selection supervisor. Vespia tentatively selected Thomas Staples as Chief of USMAS; Staples was never informed, however, of that decision. Instead, because of several procedural irregularities, and perhaps because St. Peter filed a charge of discrimination, the entire process was voided.[1/]

1/ Joint Appendix (J.A.) at 26. Three other procedural irregularities may have contributed to the decision to void the initial selection. First, in choosing candidates to be interviewed, the rating and ranking panel failed to consider an individual who should have been con-

A voluntary equal employment opportunity officer, Michael Berger, investigated St. Peter's initial charge. Vespia told Berger that he had been looking for someone who would fit his image of a West Point cadet, and Berger concluded that either Vespia or OMPD preferred a man for the job. At the close of his investigation, Berger recommended to Carol Burnette, the MILPERCEN civilian personnel officer involved in this selection, that the procedure be changed and that St. Peter be reconsidered.

The second procedure for filling the position also began with a rating and ranking panel. This panel again selected

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1/ continued

sidered. Second, the members of the rating and ranking panel did not "rate" and "rank" in a uniform manner. Third, Vespia was not authorized to make the selection in Hornish's absence.

the "best qualified" candidates, including St. Peter and Staples, although this time there were nine such candidates. The interviewing committee for this round consisted of three men, none of whom had been on the previous interviewing committee, and included Col. Hornish, the selection supervisor. Because the original selection procedure had resulted in a charge of discrimination, Carol Burnette, the civilian personnel officer, witnessed the inteviews as an impartial observer. The final selection was made on the basis of the performance of the candidates during these short interviews.[2/] Col.

2/ The panel asked each candidate a set of only six predetermined questions, followed by a catch-all question allowing the candidate to give the panel additional information if he so desired. The six questions were:

(1) Have you read the job description for this position?

Hornish and the other interviewers were unanimous in their selection of Staples as Chief of USMAS.

B. The Proceedings Below

On September 10, 1976, plaintiff filed a formal charge of discrimination with the

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2/ continued

(2) Based upon your reading of the job description, what do you see as the most important functions to be carried out in this position?

(3) Why are you seeking this position?

(4) Why do you feel you are qualified for the position?

(5) Do you feel you have the ability to deal with high-level officials? Please explain.

(6) Are you available to travel? The travel consists of one-week trips to West Point four times a year and three-day trips to the prep schools of Fort Monmouth two times a year.

Brief for Appellee at 10.

United States Department of the Army. She alleged that the selection of Staples for Chief of USMAS had resulted from intentional discrimination on the basis of sex. On December 23, 1977, the Department made a final determination that there had been no discrimination. St. Peter filed a complaint in the United States District Court for the District of Columbia on February 1, 1978. By agreement of the parties, the case was tried to a magistrate; the trial was held on May 7, 8, and 9, 1979.

During the trial, the magistrate heard the testimony of the key actors in the selection procedure. Witnesses included an expert on the personnel records used by the rating and ranking panel, the equal employment opportunity officer who investigated St. Peter's first charge of discrimination, the three members of the second

interviewing committee, the civilian Army Personnel Staffing Specialist who observed those interviews, St. Peter, Staples, and two of the other candidates for the job. The magistrate learned that St. Peter had served over twenty years in the Army in a variety of responsible positions and, after retiring from the Army in 1967, had been employed in several responsible civilian positions.

After reviewing all of the evidence, the magistrate entered findings of fact and conclusions of law. She found that the plaintiff and several of the other candidates were "far better qualified for the position" than was Staples. Joint Appendix (J.A.) at 27. But see note 4 infra. To support this conclusion, she pointed to St. Peter's longer career and superior formal education as well as her experience in dealing with high-ranking officials. In

contrast, she noted that Staples had started at MILPERCEN as a clerk-typist in 1964 and had only a high school education enhanced by Army courses.[3/] The magis-

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3/ St. Peter had developed extension courses for military and civilian personnel, had commanded a WAC company, had dealt with members of Congress concerning the status of individual reservists, and had recorded and monitored selections for the active Army of Army officers, ROTC cadets, and civilians in the Army reserve. As Chief of the Military Personnel Management Branch in the Canal Zone, St. Peter had been responsible for processing selections of personnel for the Canal Zone and preparing briefings for her commander to give to civilian officials, including members of Congress. As a civilian, the plaintiff had worked for a NASA contractor for more than three years in several responsible positions and had later worked as an equal employment opportunity officer for the Military District of Washington. In March of 1975, she had accepted a job in the Occupational Development Division of MILPERCEN, working on occupational survey questionnaires. J.A. at 36.

Between 1964 and 1971, Staples had been promoted to the position of Military Personnel Staffing Technician. In this capacity, Staples had identified and

trate also found that the selection process was inefficient and arbitrary, and that men as well as women were disadvantaged by it.

In her conclusions of law, the magistrate held that the plaintiff had established a prima facie case. On the ultimate question of discrimination, however, the magistrate found that the selection procedure was arbitrary, but not impermissibly discriminatory. The magistrate therefore

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3/ continued

selected enlisted personnel for training and assignments. In 1971 he had been promoted to Military Personnel Management Specialist, working on programs for proficiency pay and reenlistment bonuses. His tasks in performing this job had included briefing high-ranking officers and high-level civilian officials in the Department of Defense, evaluating enlisted personnel for training and assignments, preparing ocrrespondence, and drafting regulations. During nearly eleven years in the field of military personnel management, Staples had taken several officers' courses and a course in supervisory personnel management at the Adjutant General's School. J.A. at 41.

ruled in favor of the defendnat and dismissed the plaintiff's complaint on July 9, 1979. On August 16, 1979, the district court affirmed that decision by order and entered a judgment in favor of the defendant.

II. DISCUSSION

St. Peter maintains that the magistrate's decision is premised on three errors. First, the magistrate failed to apply the appropriate standard for a prima facie case in a promotion situation. Second, she did not place the proper burden of proof on the defendant after determining that a prima facie case had been established. Third, and closely related to the second point, the defendant should have been required to demonstrate that Staples

was more qualified than St. Peter in order to rebut the prima facie case.

A. The Prima Facie Case

The magistrate did not articulate the precise factors she considered crucial to establish a prima facie case of a discriminatory failure to promote. She did refer to McDonnell Douglas Corp. v. Green, 411 U.S 792 (1973), however, and, citing Olson v. Philco-Ford, 531 F.2d 474 (10th Cir. 1976), concluded that a "[p]laintiff must prove more than the mere fact of the promotion of a qualified male over a qualified female." J.A. at 30.

As the magistrate realized, any analysis of the appropriate components of a prima facie case must begin with McDonnell Douglas, the leading Supreme Court case in this area. There the Court described the evidence that the plaintiff

must present to establish a prima facie case in a hiring situation:

> (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that despite his qualification, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.

411 U.S. at 802. The facts before us are slightly different from those in McDonnell Douglas; this case involves the promotion of one person from a pool of qualified applicants rather than the refusal to hire a member of a protected group and then a continued search for other applicants with similar qualifications. Some courts have held that in such a promotion situation more than selection of a male over a qualified female must be shown. See, e.g., Olson v. Philco-Ford, 531 F.2d 474 (10th Cir. 1976).

I need not address the validity of this view here, however, because the magistrate did find that the plaintiff had established a prima facie case. I see no harm to the plaintiff in the route used by the magistrate to reach that conclusion; she found that the plaintiff had proved not only that she was qualified, but that she was more qualified than the successful candidate.[4/] The plaintiff was not prej-

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4/ It is not entirely clear why the magistrate believed St. Peter eminently more qualified for this position than Staples. St. Peter's superior formal education was irrelevant because, as a matter of law, educational background other than job-related courses may not be used as a selection criterion. See 5 U.S.C. § 3308 (1976). Staples had taken more job-related courses than had St. Peter. In addition, Staples had somewhat higher ratings from his MILPERCEN supervisors than did St. Peter, compare J.A. at 45 with J.A. at 39, and apparently performed much better in his selection interview. Although St. Peter may have had more experience dealing with high-ranking officials over her longer

udiced, therefore, as a result of the analysis employed by the magistrate.

B. The Defendant's Burden

Plaintiff's second objection concerns the burden of proof placed upon the defendant to rebut the prima facie case. St. Peter maintains that once a prima facie case is established, the plaintiff is entitled to recover "unless the defendant can prove that one of the other candidates for the position was more qualified than plaintiff and would have been selected for the position, even absent any discrimination." Brief for Appellant at 14. The magistrate found that St. Peter was more qualified than Staples. She concluded,

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4/ continued

career, Staples was not totally lacking in such experience. See note 3 supra.

however, that there had been no unlawful discrimination, that the selection process had been arbitrary but not discriminatory.

The Supreme Court has resolved this precise issue in a manner consistent with the magistrate's decision. In Texas Department of Community Affairs v. Burdine, 101 S.Ct. 1089 (1981), a unanimous Court held that once a Title VII plaintiff establishes a prima facie case, the burden shifts to the defendant to articulate a believable nondiscriminatory reason for the employment action.

> The burden that shifts to the defendant ... is to rebut the presumption of discrimination by producing evidence that the plaintiff was rejected, or someone else was preferred, for a legitimate, nondiscriminatory reason. The defendant need not persuade the court that it was actually motivated by the proffered reasons. ... [T]o satisfy this intermediate burden, the employer need only produce admissible evidence which would allow the trier of fact rationally to con-

> clude that the employment decision had not been motivated by discriminatory animus.

Id. at 1094, 1096 (emphasis added). In the case at hand, therefore, the magistrate quite properly placed no burden of persuasion upon the defendant.

Defendant's articulation of its nondiscriminatory rationale for the employment action at issue here is clearly revealed in the record. Thus, defendant chose not to review the applicants' backgrounds prior to the interviews because of a belief in the general equality of qualifications. J.A. at 87. Moreover, because the position to be filled was considered largely a sales position, J.A. at 88-89, the short interviews were seen as an effective vehicle for the evaluation of "enthusiasm" and salesmanship. The magistrate's opinion reflects an understanding

of this rationale advanced by the defendant.[5/] Where, therefore, the format of the trial has complied with the criteria established in McDonnell Douglas and later cases, the magistrate's failure to state specifically the defendant's articulated rationale is not critical to an understanding of the factual basis of her ultimate conclusion and does not require a remand. E.g., Lujan v. New Mexico Health and Social Services Department, 624 F.2d 968, 970 (10th Cir. 1980). Cf. Klapac v. McCormick, 640 F.2d 1361, 1363-65 (D.C. Cir. 1981) (per curiam).

5/ I do not endorse the selection procedure employed by the Army in this case. As the magistrate aptly observed, however, we are "not in the personnel business." J.A. at 29. "The fact that a court may think that the employer misjudged the qualifications of the applicants does not in itself expose him to Title VII liability...." Burdine, 101 S.Ct. at 1097.

C. The Ultimate Burden of Persuasion

Plaintiff's final and related objection is simply that the defendant never gave a good reason for selecting Staples over her. Again, the Supreme Court's decision in Burdine makes clear that the defendant need not produce evidence that the person selected was better qualified than the plaintiff. Instead, the ultimate burden of persuasion remains on the plaintiff to establish unlawful discrimination. In Lieberman v. Gant, 630 F.2d 60 (2d Cir. 1980), the Second Circuit correctly forcast the result and rationale of Burdine. Judge Friendly's statement for the court on this issue demonstrate the error of plaintiff's contention.

> It is enough for the defendants in the second phase of the case to bring forth evidence that they acted on a neutral basis. They do not have

> the burden of establishing that their basis was sound; rather the burden then falls on the plaintiff to demonstrate that it is pretextual. One way of doing this, of course, would be to show that the asserted neutral basis was so ridden with error [or arbitrary] that defendant could not honestly have relied upon it.

Id. at 65 (footnote omitted). I find no reason to overturn the magistrate's conclusion that plaintiff failed to carry her ultimate burden of persuasion.

III. CONCLUSION

After examining the decision of the magistrate in conjunction with the evidence of record, we find no reason to disturb the judgment for the defendants. Although the selection process employed by the Army certainly lacked sophistication, I agree with the magistrate that the promotion of a male over the plaintiff as a result of this process did not violate Title VII. Furthermore, although the magistrate's opinion

could have been more finely tuned, I do not uncover any error inuring to the detriment of the plaintiff. We therefore affirm the judgment for the defendants.

It is so ordered.

MIKVA, Circuit Judge, concurring in the result: I agree what there is no basis for reversing the judgment for the defendants. I do not agree that Texas Department of Community Affairs v. Burdine, 101 S.Ct. 1089 (1981), is dispositive of this case. Burdine properly put to rest the mischievous notion that once a prima facie case was established by a Title VII complainant, the employer had to prove that the person hired or promoted was more qualified than the complainant. Even under Burdine, however, there is a burden that the employer must satisfy to overcome a prima facie case. Although an employer need not convince the court that it chose the better applicant, it must present an explanation that is not only "clear and reasonably specific," but also sufficient to allow "the trier of fact rationally to conclude that the employment decision had

not been motivated by discriminatory animus." Burdine, 101 S.Ct. at 1096. In the case at bar, the magistrate found that burden satisfied.

The extra difficulty presented by this case is the magistrate's gratuitous finding that the plaintiff was more qualified than the person hired. Employers usually act in their own best interests, and it is somewhat incongruous to find that the employer chose a less-qualified man, rather than a more-qualified woman, but did not do so for discriminatory reasons. Although it may be difficult to convince a trier of fact that an employer selected a less-qualified person for a non-discriminatory reason, such behavior is not actionable. In any case, as Judge Tamm's opinion makes clear, the basis for finding St. Peter more qualified is tenuous at best, and the magistrate was ultimately convinced by the evidence that

no discriminatory intent was present. In the posture of this appeal and applicable law, therefore, we need not address either the pertinence or the adequacy of the finding of superior qualifications.

NICHOLS, Judge, dissenting: Though the service records of St. Peter, Staples, and other candidates were available, the interview panel did not even look at them because it assumed, erroneously, that such records had already been determined to be neutral in the weight they added to or subtracted from one or the other candidacy. This is a frivolous method of making a selection for promotion, a type of decision making supposedly long since banished from the executive branch. I fail to see the mere explantion that defendant followed such method as satisfying the Burdine test. The evidence does not allow the trier of fact to conclude that the decision was not motivated by discriminatory animus. Even if not required to persuade, defendant must articulate a reason for its choice that would be acceptable if believed. A frivolous selection method furnishes evidence

only in a negative sense, that is, that the real decision was made at a time, by persons, and by methods, that defendant does not see fit to divulge. The prima facie case is, therefore, unrebutted. The issues to my mind would be no different if defendant explained it selected Staples because he was a Leo or a Taurus. The latter explantion might, indeed, be sufficient for some private employers, but not for the U.S. Government with all its solemn standards and procedures. The magistrate in effect found the ostensible selection method to be frivolous, but failed to draw the unavoidable conclusion from her own finding.

DECISION OF U.S. MAGISTRATE,
July 9, 1979

IN THE

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

==========

VIRGINIA M. ST. PETER,

Plaintiff,

v.

CLIFFORD ALEXANDER, et al.,

Defendants.

==========

Civil Action No. 78-0187

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OPINION

This action was brought pursuant to Title VII of the Civil Rights Act of 1964, as amended by the Equal Employment Opportunity Act of 1972, 42 U.S.C. §2003-16, et. seq. Specifically, Plaintiff charged that

she was non-selected for a promotion to the position of Supervisory Military Personnel Management Specialist, GS-205-12, because of her sex, and that a less qualified male was selected.

By consent of the parties, trial was had before the U.S. Magistrate on May 7, 8, and 9, 1979; the accompanying order constitutes the final judgment in the case.

FINDINGS OF FACT

Plaintiff is a white female, who at the time of trial was employed as a Military Occupational Management Specialist, GS-205-12. In August, 1976, the position in question became available at the U.S. Army Military Personnel Center (MILPERCEN).

The incumbent in this position is responsible for facilitating the nomination and selection of candidates for the U.S.

Military Academy. The duties include the determination of the eligibility of candidates, pursuant to regulations; the conduct of communications with nominating authorities and others; the role of spokesperson for the Army on matters having to do with nominations and selections; and direct communications with congressional members and their staffs on matters concerning the nomination and selection process.

Initially, a list of five "best qualified" candidates, which included both the plaintiff and the successful employee ("Staples"), was prepared from an array of all MILPERCEN employees who had been in grade GS-11 for more than 12 months. Plaintiff was the only female on this list.

In the absence of the director, Lt. Col. Vincent Vespia interviewed Staples; the other candidates were interviewed by both Vespia and another officer. Based on this, Vespia selected Staples, and prepared a form justifying this selection. Before this was finalized, the rating and ranking panel and the interview and selection panel were reconstituted to redo the selection process. Whether this was a result of a discrimination complaint filed by the plaintiff, or by the discovery of some irregulatities in the original procedure, was never completely clear.

The specifications for the position were revised and the second time there were nine candidates on the list, all of whom were interviewed by a panel consisting of the Director of OPMD, Col. Hornish

(whose deposition is in evidence), and Lt. Cols. Sands and Joiner, who testified at the trial. Carol Burnett, a personnel specialist at MILPERCEN, sat in on the interview process as a volunteer impartial observer. She also appeared as a witness.

At the conclusion of the interviews, each of the selecting officials independently chose Staples, and Col. Hornish chose him for the position.

While both Plaintiff and Staples were included in each of the "best qualified" lists, a comparison of their respective backgrounds indicates that Plaintiff, among others, appears far better qualified for the position. She has been a civilian employee of the Army since November, 1973. However, her service background began in World War II, when she was an enlisted member of WAC. In March, 1951, she re-

turned to the Army, commissioned as an officer in the Corps, serving until 1969. At the time of her retirement, she was serving as a Lt. Colonel. She has substantial academic credits, including a B.A. in journalism, and a Master's degree in education. In addition, she took a number of Army courses; served in positions requiring her to deal with Congressional and high-ranking military officials; served as Recorder on the regular Army Board, and on the Military Graduate Board. In these positions she shared responsibility for evaluating, selecting and placing reserve officers and ROTC graduates in the Regular Army. She served in the Canal Zone 1967-68 where her duties included regular briefings for high level officers and civilians. She received two medals of commendation from the Army.

Staples (the selected candidate) came to MILPERCEN 1964, as a clerk-typist, with a high school diploma, which has been supplemented by various Army courses. His assignment just before the instant promotion was in the Enlisted Personnel Management Directorate, which he testified was most helpful in the instant position.

Among Plaintiff's witnesses was William Lake, a retired Colonel in the Army. He was the F.O.I.A. contact man in MILPERCEN, at a GS-12 level. He testified, inter alia, that the interview by the Board was very brief - two to three minutes - and perfunctory; that he felt it was a waste of time, having been given no chance to talk, and with no exchange of ideas or questions. He further testified that he felt he was qualified for the job because of his background; and that he felt that the unfairness was not sex-related.

Lake's testimony as to the perfunctory character of the interview, as well as the non-sex bias of the selection was corroborated by the testimony of another Plaintiff witness, Robert Hutton, who also was on the "best qualified" list.

The selection of Staples over the other, apparently more qualified candidates, can be partially explained by an examination of the selection process. The final selection panel of three male military officers was totally ignorant of the backgrounds of the candidates. They had not examined the personnel files of any of the candidates prior to the interviews, and each testified they had never seen any of the candidates before the interviews. There was testimony that the Plaintiff, Lake, and Hutton had not been advised that the panel members had not seen their

personnel folders, and had assumed that the panelists were familiar with their qualifications prior to the interviews.

During the defense presentation each of the panel members (Col. Hornish's deposition was received into evidence) testified, in effect, that Staples was chosen for "his enthusiasm" and because he promised to "give 110% to the job". This was confirmed by the personnel expert, Carol Burnett who was present at the interviews as an impartial observer. No statistical evidence was offered by either party.

In sum, from all the testimony adduced at the trial, the selection process appears to have been totally subjective, based on fleeting impressions gained during brief interviews (estimates ranged from 2 to 15 minutes), and without any consideration to

the qualifications of the candidates who were being considered, other than the impressions made (or not made) during the interviews.

From all the evidence adduced by both sides, this Court can only conclude that the selection process for this important and sensitive position resembled nothing so much as the game of "eenie, meenie, minie, moe," with the results being of about that quality.

Clearly, the Plaintiff was disadvantaged by all of this. So, however, were MILPERCEN, and the Messers Lake and Hutton. And whatever the Court my think of the selection process, it is not in the personnel business. Therefore, on the facts, judgment can be found for the Plaintiff only if her non-selection were based on the fact of her sex. On all of the evidence,

testimonial and exhibits, the Court does not so find.

CONCLUSIONS OF LAW

As both parties recognize, the seminal case on this issue is McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). This opinion specifies several elements which must be proved by a plaintiff, incuding her membership in a protected class; her application and qualifications for the job in question; her rejection, notwithstanding her qualifications; and that the job was filled otherwise. If this prima facie case is made by the Plaintiff, the burden then shifts to the employer to articulate "some legitimate, non-discriminatory reason" for the non-selection (Furnco Construction v. Waters, 98 S.C. 2943, (1976).

To make out the requisite prima facie case, the Plaintiff must prove more than

the mere fact of the promotion of a qualified male over a qualified female (Olson v. Philco-Ford, 531 F. 2d 474, [10th Circ., 1974]). Had there been no testimony from Lake and Hutton, the Plaintiff would have difficulty in making out a prima facie case, despite the testimony that the original job specifications called for a West Point graduate, under 40 years of age. This was amended at the instructions of the personnel office, as being clearly discriminatory. However, taking all the testimony together, it was clear that however odd the selection procedure was, it was not discriminatory on sexual lines, affecting, as it did, both male and female candidates. (The Plaintiff neither claimed nor tried to prove her superior qualifications over her other witnesses.)

The Supreme Court has recently reaffirmed the principle articulated in Olson, in upholding the Massachusetts veterans' preference statute. While recognizing its severe impact on women generally, the Court points out that "significant numbers of nonveterans are men, and all nonveterans - male as well as female - are placed at a disadvantage. Too many men are affected (by this statute) to permit the inference that the statute is but a pretext for perferring men over women." (Personnel Administrator of Massachusetts v. Feeney, No. 78-233, June 5, 1979.)

Further, there is nothing unlawful per se about the use of subjective criteria, which "are not to be condemned as unlawful per se, for in all fairness to applicants and employers alike, decisions about hiring and promotion in supervisory and managerial

jobs cannot realistically be made using objective standards alone." (Rogers v. International Paper Co., 510 F. 2d 1340 [8th Circ., 1975]; see also, Hester v. Southern Railway Co., 497 F. 2d 1374 [5th Circ., 1974].)

Therefore, in consideration of all the evidence and the law cited both in this opinion and in the briefs filed by both parties, the case is decided in favor of the defendant, and the Plaintiff's Complaint is dismissed with prejudice. An order of even date is filed herewith.

UNITED STATES MAGISTRATE

ORDER OF THE
MAGISTRATE DISMISSING COMPLAINT

IN THE

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

==========

VIRGINIA M. ST. PETER,

Plaintiff,

v.

CLIFFORD ALEXANDER,

Defendant

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Civil Action No. 78-0187

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ORDER

In accordance with the Opinion filed herewith, it is by the Court this 9th day of July 1979

ORDERED that the Complaint of the Plaintiff, Virginia M. St. Peter be, and it

is hereby, dismissed with prejudice, following a trial on the merits.

This is a final judgment.

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UNITED STATES MAGISTRATE

ORDER OF DISTRICT COURT APPROVING MAGISTRATE'S OPINION AND ORDER

IN THE

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

==========

VIRGINIA M. ST. PETER,

Plaintiff,

v.

CLIFFORD ALEXANDER,

Defendant

==========

Civil Action No. 78-0187

==========

ORDER

Upon consideration of the objections of the plaintiff to the Opinion of the U.S. Magistrate filed on July 9, 1979, the response of the defendants thereto, and the entire record herein, the Court finds that

the Findings of Fact and Conclusions of Law entered by the Magistrate are not clearly erroneous. Accordingly, it is by the Court this 16th day of August, 1979,

ORDERED that the objections of the plaintiff are overruled, and it is further

ORDERED that judgment shall be entered for the defendant.

_____

United States District Judge

ANNOUNCEMENT OF ENTRY OF JUDGMENT
BY COURT OF APEALS, July 1, 1981

IN THE

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

July 1, 1981

==========

VIRGINIA M. ST. PETER,

Appellant,

v.

SECRETARY OF THE ARMY,

Defendant.

RE: Appeal No. 79-2066 - Virginia M. St. Peter v. Sec. of the Army

Dear Sir:

Enclosed herewith are three (3) copies of the opinion in the above entitled case.

Please note that the judgment has been entered on the same date as the opinion and is for mandate purposes only.

Very truly yours,

Anita D. Holt
Opinions Clerk

ORDER OF THE COURT OF APPEALS
DENYING REHEARING, August 13, 1981

IN THE

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1980

No. 79-2066

ARGUED 12-11/80

==========

VIRGINIA M. ST. PETER,

Appellant,

v.

SECRETARY OF THE ARMY.

BEFORE: Tamm and Mikva, Circuit Judges and
Philip Nichols, Jr.,*
Judge, United States Court of Claims

*Sitting by designation pursuant to Title 28 U.S.C. §293(a).

ORDER

On consideration of appellants's petition for rehearing, filed July 15, 1981, it is

ORDERED by the Court that the aforesaid petition for rehearing is denied.

Per Curiam

United States Court of Appeals
for the District of Columbia Circuit

FOR THE COURT:

George A. Fisher,
Clerk

Filed Aug. 13, 1981

GEORGE A. FISHER
CLERK

BY:
Robert A. Bonner
Chief Deputy Clerk

ORDER OF THE COURT OF APPEALS
DENYING SUGGESTION FOR REHEARING
en banc, Aug. 13, 1981

IN THE

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1980

No. 79-2066

ARGUED 12-11/80

==========

VIRGINIA M. ST. PETER,

Appellant,

v.

SECRETARY OF THE ARMY

BEFORE: Robinson, Chief Judge, Wright, McGowan, Tamm, MacKinnon, Robb, Wilkey, Wald, Mikva, Edwards and Ginsburg, Circuit Judges and Philip Nichols, Jr.,* Judge, United States Court of Claims

*Sitting by designation pursuant to Title 28 U.S.C. § 293(a).

O R D E R

Appellant's suggestion for rehearing en banc has been circulated to the full Court. A majority of the Court has not voted in favor thereof. On consideration of the foregoing, it is

ORDERED by the Court en banc that the aforesaid suggestion is denied.

Per Curiam

United States Court of Appeals
for the District of Columbia Circuit

FOR THE COURT:

George A. Fisher,
Clerk

Filed Aug. 13, 1981

GEORGE A. FISHER
CLERK

BY: _____
Robert A. Bonner
Chief Deputy Clerk

Circuit Judge Wright would grant the suggestion for rehearing en banc

Opposition

FILED
FEB 20 1982
ALEXANDER L. STEVA
CLERK

No. 81-917

In the Supreme Court of the United States

OCTOBER TERM, 1981

VIRGINIA M. ST. PETER, PETITIONER

v.

JOHN O. MARSH, JR., SECRETARY OF THE ARMY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

REX E. LEE
Solicitor General

J. PAUL MCGRATH
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Washington, D.C. 20530
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QUESTION PRESENTED

Whether Army officials, in promoting a male, rather than petitioner, to a civilian GS-12 position, discriminated against petitioner on the basis of her sex in violation of Title VII of the Civil Rights Act of 1964.

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In the Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-917

VIRGINIA M. ST. PETER, PETITIONER

v.

JOHN O. MARSH, JR., SECRETARY OF THE ARMY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-27a) is reported at 659 F.2d 1133. The opinion of the magistrate (Pet. App. 28a-41a) is not reported. The district court adopted the magistrate's decision without writing an opinion.

JURISDICTION

The judgment of the court of appeals was entered on July 1, 1981. Petitioner's petition for rehearing was denied on August 13, 1981. The petition for a writ of certiorari was filed on November 12, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner, a female civilian employee of the Department of the Army, filed this action in the United States District Court for the District of Columbia, claiming that respondent violated Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, by selecting a male, Thomas K. Staples, rather than petitioner, to fill the position of Chief of the United States Military Academy Section (USMAS), of the Officer Personnel Management Directorate in the United States Military Personnel Center (Pet. App. 3a-8a).

The Chief of USMAS is responsible for coordinating the nomination and selection of candidates for the United States Military Academy at West Point. The Chief is spokesman for the Army on matters relating to the selection and nomination process, and deals directly with nominating officials, including members of Congress, their staffs, and other high ranking government and military officials (Pet. App. 3a).

In August 1976, the position of Chief was vacant and the Department of the Army took appropriate steps to fill it. Initially, a rating and ranking panel selected five "best qualified" candidates, including Mr. Staples and the petitioner. These candidates were then interviewed by a two-member committee consisting of Lt. Colonel Vespia and another officer. Lt. Colonel Vespia, the deputy to Colonel Hornish, the officer in charge of selecting the Chief, tentatively selected Staples (Pet. App. 4a). After having learned that Staples had been tentatively chosen, petitioner filed a charge of sex discrimination (*ibid.*). Staples was not selected, however, because Colonel Hornish

rejected the selection procedure because of certain irregularities.[1]

The second selection process consisted of the same kind of two-tiered procedure as the first. A rating and ranking panel selected the nine "best qualified" candidates, including Staples and the petitioner, to be interviewed (Pet. App. 5a-6a). These candidates were then interviewed by three officers, none of whom served on the first interviewing committee (*ibid.*). One of these officers was Colonel Hornish, the selecting official (*ibid.*). Prior to the interviews, Hornish, in an effort to remain unbiased, deliberately avoided discussions with Vespia regarding the nullified selection process (J.A. 77, 109). Nor did Hornish review the candidates' educational backgrounds, which as a matter of law may not be used as a selection criterion (J.A. 87-88). See 5 U.S.C. (Supp. IV) 3308. Furthermore, none of the members of the interviewing

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[1] Colonel Hornish cited three procedural problems. First, in choosing the candidates to be interviewed, the rating and ranking panel did not consider a person who should have been considered. Second, the members of the rating and ranking panel did not uniformly apply the criteria for choosing candidates to be interviewed. Third, Colonel Vespia was without authority to make the selection in Hornish's absence (Pet. App. 4a-5a n.1).

Although the court of appeals suggests that Hornish may have voided the initial selection process because petitioner filed her discrimination charge (Pet. App. 4a), the magistrate found that "[w]hether this [voiding the selection process] was a result of a discrimination complaint filed by the [petitioner], or by the discovery of some irregularities in the original procedure, was never completely clear" (Pet. App. 31a).

An equal opportunity officer did in fact investigate petitioner's initial charge of sex discrimination and recommended that a new selection procedure be initiated, and that petitioner be reconsidered (Pet. App. 5a).

panel reviewed any of the candidates' employment backgrounds prior to the interviews. Hornish explained that the panelists chose to conduct the interviews without such information in order to avoid pre-interview bias and because they assumed that since all the candidates had been selected by the rating and ranking panel as "best qualified" all the candidates had adequate backgrounds and skills for the job (J.A. 87, 95, 100).

The panel interviewed the nine candidates by asking each the same six questions, and giving each a chance to add whatever other information he or she thought appropriate (Pet. App. 6a-7a).[2] Because of the previous charge of sex discrimination, a civilian personnel officer witnessed the interviews as an observer (*id.* at 6a, 32a).[3] The members of the interviewing panel made notes after each interview, but did not discuss any of the candidates until the completion of all the interviews (J.A. 127). After the interviews, each member of the panel reported that he had chosen Staples (Pet. App. 32a). On the basis of

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[2] The questions were (Pet. App. 6a-7a n.2):

(1) Have you read the job description for this position?

(2) Based upon your reading of the job description, what do you see as the most important functions to be carried out in this position?

(3) Why are you seeking this position?

(4) Why do you feel you are qualified for the position?

(5) Do you feel you have the ability to deal with high-level officials? Please explain.

(6) Are you available to travel? The travel consists of one-week trips to West Point four times a year and three-day trips to the prep school of Fort Monmouth two times a year.

[3] The officers who were on the interviewing panel are male; the personnel officer who observed is female.

the committee's recommendation, Hornish selected Staples for the position.[4]

In September 1976, the petitioner filed a charge of sex discrimination with the Department of the Army (Pet. App. 7a-8a). After the Department determined that there had been no sex discrimination in the selection process, petitioner brought suit in district court. After a trial, the United States Magistrate found that Army officials had not discriminated against petitioner on the basis of her sex and, accordingly, dismissed the complaint with prejudice (Pet. App. 42a-43a). The district court affirmed without opinion (Pet. App. 44a-45a).

The magistrate ruled that petitioner had made out a prima facie case of sex discrimination, but concluded that the Army had articulated a " 'legitimate, non-discriminatory' reason for the non-selection" (Pet. App. 38a; citation omitted). See *McDonnell Douglas Corp* v. *Green*, 411 U.S. 792 (1973); *Texas Department of Community Affairs* v. *Burdine*, 450 U.S. 248 (1981). The magistrate found that the Army had determined its final selection upon the basis of the impression made by the candidate in a personal interview with the selecting official—a procedure which, although subjective, did not for that reason constitute a violation of Title VII. The magistrate recognized that "whatever the Court [may] think of the selection process, it is not in the personnel business" (Pet. App. 37a). The sole issue for the magistrate was whether petitioner's "nonselection [was] based on the fact of her sex" (*ibid.*). Conclud-

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[4] Hornish testified that the three attributes he considered most important for the job were enthusiasm about the job, direct style of communication and neat appearance, and that Staples was more impressive than petitioner with respect to each (J.A. 93-95).

ing that it was not, the magistrate observed that the procedure "was not discriminatory on sexual lines, affecting, as it did, both male and female candidates" (Pet. App. 39a). The district court sustained the magistrate's decision.

The court of appeals affirmed. Judge Tamm, in the opinion announcing the court's judgment, concluded that the magistrate had held that petitioner had established a prima facie case[5] and that respondent had discharged its burden of producing evidence sufficient to rebut the petitioner's prima facie case. Although acknowledging that the magistrate did not expressly articulate the Department of Army's nondiscriminatory rationale for selecting Staples, Judge Tamm concluded that the nondiscriminatory rationale was "clearly revealed in the record" (Pet. App. 18a) and appreciated by the magistrate. Judge Tamm noted that the interviewing panel decided not to review the candidates' backgrounds before

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[5] Judge Tamm noted that the magistrate apparently based her conclusion on her finding that the petitioner was more qualified than Staples. Judge Tamm, however, questioned this conclusion. He stated (Pet. App. 15a-16a n.4):

> It is not entirely clear why the magistrate believed St. Peter eminently more qualified for this position than Staples. St. Peter's superior formal education was irrelevant because, as a matter of law, educational background other than job-related courses may not be used as a selection criterion. *See* 5 U.S.C. § 3308 (1976). Staples had taken more job-related courses than had St. Peter. In addition, Staples had somewhat higher ratings from his MILPERCEN supervisors than did St. Peter, *compare* J.A. at 45 *with* J.A. at 39, and apparently performed much better in his selection interview. Although St. Peter may have had more experience dealing with high-ranking officials over her longer career, Staples was not totally lacking in such experience.

the interviews because they presumed that the candidates had generally comparable qualifications. He further observed that because the position was one requiring salesmanship, personal relations skills, and enthusiasm, Hornish rationally determined that the short interviews were the best format by which to evaluate the candidates (Pet. App. 18a).[6]

Judge Mikva, in his opinion concurring in the result, agreed that the magistrate had found that the respondent had satisfied its burden of producing evidence of non-discriminatory intent, concluding that "select[ing] a less-qualified person for a non-discriminatory reason, * * * is not actionable" and that "the basis for finding [petitioner] more qualified is tenuous at best" (Pet. App. 24a). The judge indicated that because the magistrate found there to be no discriminatory intent, there was no need for the court to consider "either the pertinence or the adequacy of the finding of superior qualifications" (*id.* at 25a).

Judge Nichols of the Court of Claims, sitting by designation, filed a dissenting opinion in which he characterized the selection process as "frivolous" (Pet. App. 26a), and the Army's offered rationale for the process to be insufficient to rebut a prima facie case of sex discrimination.

ARGUMENT

The decision of the court of appeals is correct, does not conflict with any decision of this Court or any other court, and does not warrant further review.

1. Petitioner argues (Pet. 18-21) that the rationale for the selection of Staples offered by the Depart-

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[6] Judge Tamm indicated that he did not "endorse" the selection procedure, but agreed with the magistrate that courts are "not in the personnel business" (Pet. App. 19a n.5).

ment of the Army "cannot be 'legitimate' or 'lawful' under *Burdine* if it demonstrates a violation of federal law and regulations governing personnel actions, since such an explanation necessarily cannot 'be legally sufficient to justify a judgment for the defendant' " (Pet. 18) (quoting *Texas Department of Community Affairs* v. *Burdine*, *supra*, 450 U.S. at 255). However, there was no violation of federal law here. And, even if we assume arguendo that there was, the decisions of both the magistrate and the court of appeals are fully consistent with *Burdine*.

Petitioner's argument is premised on the bald assertion that the selection procedure was "illegal" (Pet. 27). Although both the magistrate and the court of appeals expressed displeasure with the procedure, neither characterized it as illegal. The procedure employed utilized the ranking and selection procedure required by the then applicable provisions of the *Federal Personnel Manual*.[7] The rating and

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[7] U.S. Civil Service Commission, *Federal Personnel Manual* ch. 335, subch. 3-7 at 335-16 to 335-17 (Oct. 25, 1973) provided in relevant part:

> a. **Ranking procedures.** Ranking may be done by placing candidates in 1-2-3 rank order or by grouping them in two or more categories, one of which must be a highly qualified category. Rank order within a category is not required, but there must be a procedure for identifying the necessary number of best-qualified candidates for referral to the selecting official. * * *
>
> b. **Referral of candidates to the selecting official.** (1) Selecting officials should have the opportunity to make their choice from among an adequate number of the best-qualified candidates, but should not be burdened with numerous candidates to consider. Moreover, they should be able to choose from among highly qualified candidates whenever possible. Therefore, the following procedures shall be adopted in certifying agency candidates to the selecting official:

ranking panel selected nine "best qualified" candidates to be interviewed by the interviewing panel. Colonel Hornish, the selecting official, and the other two members of the interviewing panel, quite properly presumed that each of the candidates was comparably well-qualified for the job on paper. Because the position called for an effective, enthusiastic communicator with salesman skills, the panel based its decision solely on the interviews. Furthermore, the interviews were witnessed by a neutral observer. The members of the interviewing panel did not discuss the candidates until all the interviews were concluded, and then independently and unanimously endorsed Staples for the position. Hornish selected Staples on

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(a) Normally three to five of the best qualified available candidates should be certified. * * * Up to 10 candidates may be certified if meaningful distinctions cannot be made among a smaller number. * * *

* * * * *

(2) Selecting officials should be provided with enough information about the qualifications of the candidates referred to them (for example, the candidates' experience, training, and education) to enable them to make a sound choice. They must be informed of any awards received by the candidates and must be given any supervisory appraisals on the candidates.

c. **Action by the selecting official.** Selecting officials are entitled to make their selections from any of the candidates on a promotion certificate, whether or not the candidates are presented in rank order, based on their judgment of how well the candidates will perform in the particular job being filled and, when relevant, what their potential is for future advancement. Selecting officials are not required, however, to select someone from the promotion certificate. He may, for example, fill the job by some other type of internal placement action or by selection, subject to the instructions in section 4-1, of someone from outside the agency who is eligible for appointment.

the basis of their recommendation and his own positive impression of Staples.

In any event, even if the selection panel members' refusal to familiarize themselves with the candidates' qualifications before making a selection based on the interviews was a violation of the selection procedures required by the *Federal Personnel Manual*, that deviation from regulatory requirements does not establish a violation of Title VII.[8] Title VII does not transmute every innocent deviation from applicable personnel regulations into a discriminatorily motivated employment decision.[9] The fundamental issue still must be whether the reason for nonselection is based upon gender, *i.e.*, whether the defendant can "articulate a believable nondiscriminatory reason for the employment action" (Pet. App. 17a). Both courts below found that the government met its burden of establishing such a non-pretextual reason here by establishing that the selecting official determined that the primary job requirements of salesmanship and enthusiasm could best be evaluated on the basis of the interviews (Pet. App. 18a-21a; 23a-25a; 37a-38a; 40a-41a). There is no need for further review of that essentially factual conclusion (the validity of which does not depend on whether the non-pretextual reason constituted a wise or proper personnel decision).

2. Petitioner's argument (Pet. 21-29), that the decisions of the courts below conflict with this Court's

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[8] Petitioner has filed only a Title VII claim; she has not independently attacked, in this proceeding, any personnel selection procedure.

[9] Petitioner does not suggest that this deviation was part of a continuing practice that operated to the detriment of women. Thus, the issues that would be involved in such a situation are not raised here.

decision in *Burdine* because Staples was assertedly less qualified than the petitioner, is similarly without merit. To begin with, both Judge Tamm and Judge Mikva expressed serious reservations about the magistrate's conclusion that petitioner was more qualified (Pet. App. 15a-16a n.4; 24a). But even assuming that the court below agreed that petitioner was more qualified, *Burdine* does not foreclose a finding of nondiscrimination in such cases. The fact that *Burdine* did not involve a situation where the reviewing court had concluded that the plaintiff was more qualified does not mean that the decision below is inconsistent with *Burdine*.[10] As Judge Tamm made plain, the teaching of *Burdine* is that the crucial question for a court is whether the employer offers a believable, non-discriminatory reason for the personnel action, and not whether the plaintiff is more qualified. Similarly, Judge Mikva observed that "[a]lthough it may be difficult to convince a trier of fact that an employer selected a less-qualified person for a nondiscriminatory reason, such behavior is not actionable" (Pet. App. 24a). The trier of fact here was convinced, and the court of appeals found no reason to disturb that ruling.

3. Finally, the decision below does not conflict with the decisions of other courts of appeals. In *Robbins* v. *White-Wilson Medical Clinic, Inc.*, 642 F. 2d 153 (5th Cir. 1981), the court overturned a district court judgment for the employer because the entire evaluation process of the black plaintiff was limited to an interview conducted by a white supervisor who

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[10] Indeed, as this Court specifically noted in that case (450 U.S. at 259): "[t]he fact that a court may think that the employer misjudged the qualifications of the applicants does not in itself expose him to Title VII liability, although this may be probative of whether the employer's reasons are pretexts for discrimination".

"assumed[d] that blacks are less likely to have appropriate personality traits than whites" (642 F. 2d at 157). The court held that even if the employer had rebutted the plaintiff's prima facie case, the proffered explanation was plainly a pretext for racial discrimination. Here, in contrast, the magistrate found that the explanation offered was unrelated to sex discrimination and that, in fact, the selection process disadvantaged the unsuccessful male candidates in precisely the same way that it did petitioner.

In *Mistretta* v. *Sandia Corp.*, 649 F. 2d 1383 (10th Cir. 1981), the court of appeals found that plaintiffs were terminated due to performance ratings that it had previously found to be *inherently* discriminatory. *Marotta* v. *Usery*, 629 F. 2d 615 (9th Cir. 1980), upon which petitioner also relies (Pet. 34), is totally inapposite because it involved a *plaintiff* who was found to be clearly *less* qualified than the other applicants for a promotion.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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Petitioner's Reply Brief

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VIRGINIA M. ST. PETER,

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Secretary of the Army.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY TO BRIEF FOR THE RESPONDENT IN OPPOSITION

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v.

JOHN O. MARSH, JR.,
SECRETARY OF THE ARMY.

On Petition For A Writ of Certiorari To
The United States Court of Appeals
For the District of Columbia Circuit

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REPLY TO BRIEF FOR THE RESPONDENT IN OPPOSITION

Petitioner wishes to reply to a number of contentions made by the government in its brief in opposition to the petition for a writ of certiorari.*/

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*/ The decision of the court below is now reported at 659 F.2d 1113.

1. Respondent does not seriously argue that the central issue presented by this case is not one of importance to the enforcement of Title VII. That issue is, can a reason which shows a violation of legally mandated personnel practices be "legitimate", and "lawful" and thereby constitute a rebuttal to a prima facie case of discrimination? This is a question not addressed by Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981) but is one that will inevitably affect the decisions in many individual Title VII cases involving federal employees. Therefore, it deserves resolution by this court.

2. The government, at page 10 of its brief, misstates petitioner's argument. It is not contended that a failure to follow proper personnel procedures in and of itself establishes a violation of Title

VII.[1/] The question rather, is once a prima facie case of discrimination has been established, can an action which violates proper procedures be relied upon to rebut it. In other words, can it constitute an explanation that is "legally sufficient to justify a judgment for the defendant." 450 U.S. at 255.

3. The government takes issue with petitioner's contention that the selecting officials did not follow the mandated provisions of the Federal Personnel Manual. However, the language cited both by petitioner and by the government, viz, paragraph b.(2) of Chapter 335 of the Manual set out in the footnote on page 9 of

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1/ It should be noted, however, that under Village of Arlington Heights v. Metropolitan Housing Corp., 429 U.S. 252, 267 (1977), a failure to follow proper procedures can be one element of proof of intentional discrimination.

Respondent's Brief, states with utmost clarity that selecting officials are to be provided information about the qualifications of the candidates, including their experience, training, and education, "to enable them to make a sound choice." It is clear beyond contradiction that this requirement was followed in the present case. The interviewing panel and the selecting official did not have before them and, indeed, deliberately declined to consider, information concerning the qualifications of the candidates provided through the selection process. It is hard to imagine a clearer failure to follow procedures whose very purpose is to ensure a valid choice based on the relative merits of the candidates.

4. In this connection it is difficult to understand what Title VII is about

if the fact that a less qualified candidate is picked has, as the government seems to contend, no relationship to the issue whether discrimination has occurred. Certainly, the clear implication of Burdine is that the passing over of a more qualified female candidate could be justified only under the most unusual of circumstances.

5. The government never addresses the uncontradicted evidence in the record showing overt sexual bias, including the attempt to restrict candidates to persons who were graduates of West Point, the initial selection of a person who could act "buddy-to-buddy" with congressmen, and the final selection of a candidate because he had a neat "crew-cut" appearance.

6. The government seems to adopt the position of the district court that because the practices here also affected men, there

could have been no sex discrimination. If that is the rule then Title VII will cease to have any meaning, since it is a rare case indeed in which only one white or male has applied for a position. Rather, in almost all instances males will have been turned down also. The point is not that there were some males who did not get selected, but that the person who was picked was a male. Thus, the selection process and the result came out in favor of males. That fact cannot be altered by the circumstance that other males necessarily did not receive the single position available.

7. Finally, the decision below is inconsistent with post-Burdine decisions in other circuits. Since the petition for a writ of certiorari was filed there have been decisions in addition to those there

cited. See, Nanty v. Barrows Co., 660 F.2d 1327, 1332 n.5 (9th Cir. 1981), noting the court's skepticism of reliance on subjective factors similar to those used in the present case. See also, Montoya v. Anderson, 511 F. Supp. 523 (D. Col. 1981), similarly holding that the justification given to rebut a prima facie case must be "reasonably related to objective management goals." 511 F. Supp. at 525 (emphasis added).

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari should be granted.

Respectfully submitted,

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